

Date of Hearing: May 5, 2020

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Ed Chau, Chair

AB 2149 (Gonzalez) – As Introduced February 10, 2020

AS PROPOSED TO BE AMENDED

**SUBJECT:** Food delivery platforms

**SUMMARY:** The bill in print would require a food delivery platform, upon request, to share the contact information of consumers that have purchased food from a food facility with that facility. As proposed to be amended, this bill would prohibit a food delivery platform from posting a menu, likeness, trademark or other intellectual property of a food facility without the express written consent of that facility. Specifically, as proposed to be amended, **this bill would:**

- 1) Provide that a food delivery platform shall not post a menu of, or otherwise use the likeness, registered trademark, or any intellectual property belonging to, a food facility without the express written consent of the food facility.
- 2) Define “food delivery platform” to mean an online business that acts as an intermediary between customers and multiple food facilities to submit food orders from a consumer to a participating food facility, and to arrange for the delivery of the order from the food facility to the consumer.
- 3) Define “food facility” as it is defined in Section 113789 of the Health and Safety Code, i.e., to mean an operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption at the retail level.

**EXISTING LAW:**

- 1) Pursuant to federal law, provides that the United States Congress shall have power to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. (U.S. Const., art. I, sec. 8, cl. 8.)
- 2) Pursuant to federal law, establishes the Lanham Act, which, *inter alia*, prohibits the use in commerce, without the consent of the registrant, of any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services if such use is likely to cause confusion, or to cause mistake, or to deceive. (15 U.S.C. Sec. 1114(1)(a).)
- 3) Prohibits a person from using, without the consent of the registrant, any reproduction, counterfeit, copy, or colorable imitation of a mark registered under the Model State Trademark Law in connection with the sale, distribution, offering for sale, or advertising of goods or services if such use is likely to cause confusion or mistake, or to deceive as to the source of origin of the goods or services. (Bus. & Prof. Code Sec. 14245(a)(1).)

- 4) Requires a publisher, prior to including a telephone number for a facsimile machine in any commercial directory of telephone numbers, to obtain the written consent of the subscriber who has been assigned the number. (Bus. & Prof. Code Sec. 22600(a).)

**FISCAL EFFECT:** None. This bill has been keyed nonfiscal by the Legislative Counsel.

**COMMENTS:**

- 1) **Purpose of the bill:** This bill, as proposed to be amended, seeks to prevent food delivery platforms from listing food facilities without the consent of that facility. The bill aims to rectify consumer confusion and reputational harm that a restaurant may suffer from a consumer's mistaken inference of a business relationship between the restaurant and the platform. This bill is author sponsored.
- 2) **Author's Statement of Criticality:** In response to the unique constraints the COVID-19 crisis has placed on the legislative process, this Committee elected to focus attention this session on bills that address urgent issues and issues critical for an efficient recovery from the pandemic. In order to prioritize bills that require immediate attention, the Committee asked the author of each bill to provide a Statement of Criticality explaining the applicability of one or more of the following criteria to that bill:
  - the bill addresses a problem that was created by, or has been significantly exacerbated by, the ongoing public health crisis due to COVID-19, or the response thereto;
  - the bill addresses an urgent problem that presents a threat to the safety and security of Californians and must be resolved immediately; or
  - the bill makes a technical change to an existing program or function that must be immediately adopted to preserve the utility of that program or function.

In response, the Author writes:

AB 2149 seeks to protect small restaurants from being undercut and exploited by food delivery platforms by establishing clear rules and guidelines that govern that relationship. In light of the statewide Stay-At-Home orders, many Californians are transitioning to online delivery in order to access food from their local, small restaurants. Prior to the COVID-19 outbreak, an increasing number of restaurants were reporting dissatisfaction and troubles in their interactions with these emerging platforms. Many small restaurants reported unauthorized listing of their business on platforms, the lack of an ability to connect with their customers and difficulty with ensuring quality of service. COVID-19 has only exacerbated these issues, with news reports demonstrating restaurants are actively rethinking their relationship with these delivery platforms.

At a time when small restaurants are facing severe financial constraints, food delivery companies appear to be capitalizing on the COVID-19 crisis for their own gain. [...] [T]his bill would require food delivery companies to have an agreement in place with a restaurant prior to listing them on their platforms. Restaurants that would like to engage in business with these delivery companies would do so on a level playing field, as opposed to the current practice where they compete with other restaurants that do not pay commissions or other fees as a result of a lack of an agreement. Furthermore, those

restaurants that do not wish to engage in business with delivery companies will not have their restaurants listed on a platform without their consent, which prevents restaurants from connecting with their customers and ensuring the quality of the service the restaurant provides. (Internal citations omitted.)

The Committee agrees that the issue addressed by this bill is timely and critical under the current circumstances. According to the California Restaurant Association, the restaurant industry has suffered the most significant sales and job losses of any industry since the COVID-19 outbreak began.<sup>1</sup> More than 8 million restaurant employees have been laid off or furloughed, and the industry lost approximately \$80 billion in sales as of the end of April.<sup>2</sup> Coincident with the hardship faced by the restaurant industry, the use of food delivery platforms, which facilitate food orders, pick-up, and delivery from restaurants and other food facilities, has seen a marked increase as food delivery continues to accommodate a population sheltering-in-place. According to the market research firm Edison Trends, in the first week after several major cities initiated stay-at-home orders, United States consumer spending on food orders via DoorDash, UberEats, Grubhub, and Postmates, four of the top competitors in the increasingly competitive food delivery platform industry, increased by more than 10 percent relative to the previous week.<sup>3</sup>

Facing severe economic hardship, many small restaurants lack the staff capacity and logistical resources to transition from primarily dine-in operations to in-house managed delivery services. Nonetheless, with dine-in service on indefinite hiatus, restaurants and food delivery platforms are competing to provide increasingly similar services. This coalescence limits the ability of consumers to determine whether a delivery order is being fulfilled by the restaurant or by a delivery platform, rendering it essential to clarify the relationship, or lack thereof, between the two. The Committee recognizes that an equitable and mutually beneficial relationship between food facilities and food delivery platforms is critical for the recovery of the foodservice industry following the COVID-19 crisis. This bill, which seeks to mitigate allegedly misleading tactics by food delivery platforms that may harm the restaurant industry, thus meets the criteria of this Committee as immediately relevant to the needs of California's businesses and residents.

- 3) **The bill in print raises significant privacy concerns:** As currently in print, this bill requires a food delivery platform to, upon request, share with a food facility certain information about consumers that have purchased food from that facility through the platform, including a consumer's email address, telephone number, and delivery address, as well as that consumer's purchasing history with the requesting food facility. The author contends that sharing this information with the food facility is critical to permit the food facility to notify consumers of possible public health issues, to follow up with consumers for quality control, and to improve targeted consumer outreach.

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<sup>1</sup> *California Restaurant Association*, "Coronavirus Information and Resources," Apr. 30, 2020, <https://restaurant.org/Covid19>.

<sup>2</sup> *Ibid.*

<sup>3</sup> Preetika Rana & Heather Haddon, "Coronavirus Lockdowns Prompt Smaller Restaurants to Rethink Delivery," *The Wall Street Journal*, Apr. 1, 2020, <https://www.wsj.com/articles/coronavirus-lockdowns-prompt-smaller-restaurants-to-rethink-delivery-11585743246/>.

Though the bill in print specifies that this data sharing provision shall not apply to the personal information (PI) of a consumer who has exercised their right to opt-out of the sale of personal information by the food delivery platform pursuant to the California Consumer Privacy Act of 2018 (hereinafter “CCPA”; Civ. Code Sec. 1798.120), it nonetheless runs counter to the intent of the CCPA to protect consumer data from unexpected disclosure and poses significant issues for workability within the CCPA framework. Under the provisions of the bill in print, the breadth of distribution of PI that a purchase through a food delivery platform entails would be dramatically expanded. While the information shared is limited to contact information and purchasing history, these data, especially when viewed en masse, can paint a surprisingly intimate portrait of behavior presumed to be private. For instance, access to delivery address information for a specific consumer over the course of a year can potentially be used to infer the home address, workplace, and even social relationships of that consumer.

Rather than providing this sensitive information only to the platform, whose uses and sharing practices must be disclosed to the consumer pursuant to CCPA with the opportunity to opt-out, a customer utilizing a food delivery platform is instead providing their PI to the platform and every entity that platform interacts with to fulfill that customer’s order. Put simply, the customer’s information is in the hands of more entities, with little additional benefit to the consumer. Notably, this type of personal contact information is not required to be provided in the course of a normal in-person transaction with a business.

In addition to these privacy concerns, this bill also presents significant workability issues for the CCPA, which requires businesses to disclose to the consumer how their personal data will be collected, retained, used, and shared, and to conspicuously provide the consumer the opportunity to opt-out of the sharing of their information. Because the bill in print would cause the consumer’s PI to be shared with numerous facilities with whom the consumer never interacts directly, these mandatory disclosures and rights that must be provided at the point of use under CCPA may never actually be provided to the consumer for each business receiving their information. The bill in print would also make it substantially more difficult for consumers to exercise their rights under CCPA, as rather than simply requesting the nature or deletion of information maintained and shared by the platform, the consumer must instead request deletion by the platform and the platform would then be required to communicate that request to each restaurant. Staff notes that the right to deletion in the CCPA only exists between a consumer and the business that collected the information. Thus, in the situation anticipated by this bill, a restaurant would not be required to honor a consumer’s request to delete a consumer’s PI if that PI was received from the platform. Since the sharing of information is opt-out rather than opt-in, the consumer may not even be aware that their information is being shared in this manner at the time of purchase, or recall that that restaurant now possesses their PI.

Prudently, the author has acknowledged these privacy concerns, and has agreed to amend the bill to remove this mandatory disclosure of consumer data.

**4) Proposed amendments prohibit listing of food facilities on platforms without consent:** The proposed amendments to AB 2149 replace the consumer data sharing provisions with a provision prohibiting a food delivery platform from posting a menu of, or otherwise using the likeness, registered trademark, or any intellectual property belonging to, a food facility without the express written consent of the food facility. Arguably, these

amendments move the bill beyond the jurisdiction of this Committee. Nonetheless, the bill as proposed to be amended identifies a real problem that has arisen in the relationship between food delivery platforms and restaurants, which has been exacerbated by the COVID-19 crisis. As the application-based food delivery platform space becomes more competitive, many platforms have sought to expand their consumer engagement by increasing the listed establishments from which they deliver. However, many of these platforms do not establish any sort of business contract or agreement with that establishment prior to listing it, and many fail to even inform the establishment that they've been listed. DoorDash, PostMates, and Grubhub, three leading delivery platforms, have been documented engaging in this practice, often to dismay of the restaurant owners.<sup>4</sup> These practices have also resulted in several lawsuits alleging trademark infringement, most of which have been settled out of court.<sup>5</sup> Grubhub has reportedly gone a step further, registering several web domains including the names of restaurants or variations on those names without informing or requesting consent from those restaurants, and using those URLs to arrange orders from those restaurants through their platform.<sup>6</sup>

These food delivery platforms argue that these listings are mutually beneficial, both driving up consumer engagement with the platform and providing free advertising and additional business to restaurants. This is undoubtedly true in some circumstances. However, this practice also creates significant accountability issues, as consumers are often unaware of whether an issue with their order results from the restaurant or the delivery service, and may not even know which one they are ordering from. This is particularly true in light of the COVID-19 crisis, as many restaurants are either forming new relationships with platforms or are transitioning to in-house food delivery, pitting less known or accessible in-house delivery against well-known platforms who offer the same service at different prices.

When a consumer has a bad food delivery experience, this means the restaurant may be blamed for the deficiencies of the platform, potentially damaging their reputation in the absence of any consensual arrangement between the parties. To this point, a 2019 study by the market research firm Zion & Zion found that 62 percent of consumers who receive a bad food delivery experience blame both the restaurant and the delivery company. That number increases to nearly 72 percent when food is delivered at the wrong temperature.<sup>7</sup>

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<sup>4</sup> Serena Dai, "Delivery Start-Up DoorDash Infuriates Some Restauranters by Working Around Them," *Eater: New York*, Nov. 6, 2015, <https://ny.eater.com/2015/11/6/9678206/door-dash-delivery-nyc>; Sara Jones, "The Postmates Problem: Why Some Restaurants Are Forced to Fight the Delivery App," *Eater*, Jul. 31, 2015, <https://www.eater.com/2015/7/31/9074491/postmates-delivery-problems>; Natt Garun, "Grubhub's new growth hack is listing restaurants that didn't agree to be listed," *The Verge*, Jan. 30, 2020, <https://www.theverge.com/2020/1/29/21113876/grubhub-seamless-fake-restaurant-listings-no-permission-postmates-doordash>.

<sup>5</sup> See, e.g., Whitney Filloon, "In-N-Out Burger Sues DoorDash for Delivering Its Food Without Permission," *Eater*, Nov. 11, 2015, <https://www.eater.com/2015/11/11/9714840/in-n-out-doordash-delivery-lawsuit>; Lily Rose, "DoorDash faces lawsuit from suburban Chicago Restaurant over trademark infringement," Jan. 11, 2018, <https://www.latimes.com/food/sns-dailymeal-1866262-eat-doordash-faces-lawsuit-suburban-chicago-restaurant-20180111-story.html>.

<sup>6</sup> Natt Garun, "Grubhub is using thousands of fake websites to upcharge commission fees from real businesses," *The Verge*, Jun. 28, 2019, <https://www.theverge.com/2019/6/28/19154220/grubhub-seamless-fake-restaurant-domain-names-commission-fees>.

<sup>7</sup> Alicia Kelso, "Study: 62% of diners blame both restaurants and delivery companies for bad service," *Restaurant Dive*, March 22, 2019, <https://www.restaurantdive.com/news/study-62-of-diners-blame-both-restaurants-and-delivery-companies-for-bad/551077/>.

Additionally, food delivery platforms often charge customers service and delivery fees, in addition to listing higher prices for the same menu items. For the top five food delivery platforms, these markups total to increases ranging from 17 percent to 40.5 percent of list price for the same items at the restaurant.<sup>8</sup> Though these costs are imposed by the platform, consumers may assume the costs are the result of agreements between the restaurant and the platform, or are the typical prices for the restaurant itself, skewing the perceived value of the restaurant's product.

By requiring a food delivery platform to obtain the express written consent of a food facility before using its menu, likeness, trademark, or other intellectual property, the proposed amendments would reduce consumer confusion over business relationships between restaurants and platforms, since a listing would imply that a relationship exists.

- 5) **Proposed amendments may be preempted by federal trademark laws relating to nominative fair use:** Although AB 2149 identifies and seeks to address a real problem, the approach to resolving that problem may present some legal issues. Trademark law, which exists in both state and federal statute (15 U.S.C. Sec. 1114 et seq.; Bus. & Prof. Code Sec. 14200 et seq.), generally already serves the purpose of prohibiting the unauthorized use of symbols, phrases, names, etc. that could confuse customers and harm the reputation of the represented party. In contrast to existing trademark protections under the Lanham Act and associated case law (15 U.S.C. Sec. 1114, et seq.), the protection that would be provided by this bill would not require the party infringed upon to be harmed by the use of their signifier. Arguably, if no harm has occurred, penalty may not be necessary. Nonetheless, there does appear to be significant redundancy between the protection of intellectual property this bill seeks to provide, and protections that already exist in both state and federal law, potentially obviating the need for this bill.

If, in fact, the bill is not redundant with federal trademark law, it may instead be preempted by federal law, since federal law permits so-called "nominative fair use." Nominative fair use, which refers to the unauthorized use of a trademark, copyright, or other intellectual property in order to refer to a particular thing where the only word or icon reasonably available to describe that thing would otherwise be prohibited, is considered outside the strictures of trademark law. (*New Kids on the Block v. News Am. Publ'g, Inc.* (1992) 971 F.2d 302, 307-308.) Nominative fair use is considered an affirmative defense to trademark infringement, and, as was held in *New Kids on the Block*, is determined by meeting three requirements:

First, the product or service in question must be one not readily identifiable without use of the trademark; second, only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and third, the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder. (*New Kids on the Block v. News Am. Publ'g, Inc.*, supra.)

The non-consensual use of the trademark of a food facility by a platform may in some circumstances satisfy these criteria. Because the platform is using the name, likeness, logo, or other intellectual property of the food facility to represent that they are providing the

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<sup>8</sup> Noah Lichtenstein, "The hidden cost of food delivery," *TechCrunch*, Mar. 16, 2020, <https://techcrunch.com/2020/03/16/the-hidden-cost-of-food-delivery/>

service of delivering from that particular facility, the name, likeness, or logo, at minimum would be necessary to provide the service. In the event that the name only, logo only, or name and logo is used to represent that facility, this would arguably also satisfy the second prong of the test by using only marks that are reasonably necessary to identify the service.

The third requirement is likely the most debatable with respect to this relationship, since the use of this trademark or intellectual property may suggest sponsorship or endorsement by the trademark holder. If this is the case, the use of the trademark or other intellectual property would already be unlawful under federal trademark law, i.e. the Lanham Act. If it is not, the use would likely constitute nominative fair use, and would be explicitly permissible under federal law yet prohibited under this bill, resulting in conflict preemption. In light of this possibility, *the author may wish to consider* including a severability clause such that if any provision of the bill is unconstitutional or preempted by federal law, it can be excluded without negating the bill in its entirety.

- 6) **Author's amendments:** As discussed throughout this analysis, the author has, in light of privacy concerns identified by this Committee and stakeholders, agreed to remove the data sharing provisions of the bill in print, and to replace them with the proscription of unauthorized use of intellectual property of a food facility by a platform. These amendments are as follows:

On page 2, strike out lines 1 to 31, inclusive, strike out page 3, and on page 2, before line 1, insert:

***SECTION 1. This act shall be known, and may be cited, as the Fair Food Delivery Act of 2020.***

***SEC. 2. Chapter 22.4 (commencing with Section 22598) is added to Division 8 of the Business and Professions Code, to read:***

***Chapter 22.4. Food Delivery Platforms***

***22598. For the purposes of this chapter, the following definitions shall apply:***

***(a) "Food delivery platform" means an online business that acts as an intermediary between consumers and multiple food facilities to submit food orders from a consumer to a participating food facility, and to arrange for the delivery of the order from the food facility to the consumer.***

***(b) "Food facility" means a food facility, as defined in Section 113789 of the Health and Safety Code.***

***22599. A food delivery platform shall not post a menu of, or otherwise use the likeness, registered trademark, or any intellectual property belonging to, a food facility without the express written consent of the food facility.***

- 7) **Arguments in support:** The California Restaurant Association, a trade organization representing businesses in the food service industry, argues:

Over the past couple of years there has been an alarming trend of food delivery platforms listing a restaurant's logo or menu without permission from the restaurant. This type of business practice may help food delivery apps drive traffic to their platform, but for restaurants it creates confusion, hurts their brand, and disrupts operations.

In some cases, restaurants already have a delivery system in place operated by their own employees. If their menu is listed on an unauthorized food delivery platform, then it creates massive confusion for both the restaurant and the delivery driver who shows up. The customer, driver, and restaurant end up losing because the customer does not get their food, the driver does not get paid, and the restaurant's reputation is damaged. In other instances, a food delivery platform might post an outdated menu or logo. The chances are if a customer is using an outdated menu, then there will be issues with the food order leading to more confusion with the customer and restaurant.

The California Labor Federation adds:

In recent years, technology companies, known as food delivery platforms, have grown exponentially in the food service industry by providing delivery services to restaurants. The pandemic and stay-at-home orders have fueled the expansion of these delivery services. [...] The growth of delivery and the potential of a slow reopening of business may fundamentally alter the restaurant industry with a shift to more delivery for all restaurants.

Most third-party delivery companies are large, well-capitalized and national, which forces small, local restaurants to agree to their conditions.[...] Additionally, as reported by the San Francisco Chronicle, some restaurants are listed by a food delivery platform without their consent.[...] This is just one of the many tools they use to take advantage of restaurants, who provide jobs with actual protections to their workers.[...] AB 2149 takes steps to start to level the playing field by prohibiting delivery companies from listing restaurants on their platform without an existing agreement.

- 8) **Arguments in opposition:** The Electronic Frontier Foundation, a digital privacy and civil liberties advocacy organization, argues:

This [bill] raises significant legal issues. With respect to trademark use, the requirement of "express written consent" clearly conflicts with Ninth Circuit case law that authorizes "nominative fair use." In general, such use is permitted if using the trademark is reasonably necessary to identify the products, services, or company that one is talking about, and the user doesn't use the mark to suggest the company endorses the user.

It also presents preemption problems. The Copyright Act expressly provides that "the fair use of a copyrighted work...is not an infringement of copyright." 17 U.S.C. § 107. To the extent your amendment would require "express written consent" for the use of any work protected by copyright held by a food facility, is [*sic*] would be preempted by federal law.

This bill as amended also raises constitutional issues, because it would apparently target speech such as listing the items available on a restaurant's menu even if that speech is truthful, factual, and not misleading. We have not yet had an opportunity to conduct a

full First Amendment analysis of the provision, but we have real doubts about its constitutionality.

- 9) **Related Legislation:** AB 3336 (Carrillo, 2020) would require a food handler who delivers ready-to-eat food for a third-party food delivery system to display a valid food handler card when picking up food, ensure food is protected from contamination, and maintain potentially hazardous food at required holding temperatures. This bill would also require all bags or containers in which ready-to-eat foods are transported or delivered from a food facility to a customer to be closed with a tamper-evident method prior to the food handler taking possession.

AB 1360 (Ting, 2019) would have required food delivery platforms to ensure that their drivers had training relating to maintaining potentially hazardous foods at required temperatures and maintained liability insurance covering liabilities arising from the use of a vehicle in connection with providing food delivery services. This bill was ordered to the inactive file on the Senate Floor.

#### **REGISTERED SUPPORT / OPPOSITION:**

##### **Support**

California Labor Federation, AFL-CIO  
California Restaurant Association  
California Travel Association (CALTIA) (to bill in print)

##### **Oppose Unless Amended**

Electronic Frontier Foundation

##### **Oppose**

Internet Association (to bill in print)  
TechNet (to bill in print)

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